

Editor's note: Reconsideration granted; decision reversed -- See Peacock Oil Company, Inc. (On Reconsideration) 30 IBLA 103 (May 2, 1977)

PEACOCK OIL COMPANY, INC; TWIN ARROW INC.

IBLA 76-668

IBLA 76-671

Decided February 23, 1977

Appeals from decision of the Colorado State Office, Bureau of Land Management, holding that oil and gas lease C-028499 expired December 31, 1971, and rescinding decisions of August 6, 1974, and June 5, 1975, approving certain assignments of shallow operating rights on portions of the lands subject to said lease.

Affirmed.

1. Oil and Gas Leases: Production--Oil and Gas Leases: Renewals--Oil and Gas Leases: Twenty-year Leases

A 10-year renewal of a 20-year oil and gas lease expires by its own terms where no timely application for further renewal is made by the lessee. Such lease is not held by production and terminates automatically on its final anniversary date notwithstanding the existence of a producing well on the leasehold.

APPEARANCES: J. D. Voorhees, Esq., Moran, Reidy & Voorhees, Denver, Colorado, for appellant Twin Arrow, Inc.; David J. Myler, Esq., Feldhamer, Plotz & Eskwith, P. C., for appellant Peacock Oil Co., Inc.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Peacock Oil Company Inc. (Peacock) and Twin Arrow Inc., whose appeals are here joined, appeal from a determination of the Colorado State Office, Bureau of Land Management (BLM) dated May 24, 1976, which found the lease, under which appellants claimed shallow operating rights, to have expired on December 31, 1971, at the end of its term. The lease here at issue is a 10-year renewal of a 20-year lease (Colorado 028499), issued effective January 1, 1962, to Flank Oil Company. This lease account was transferred to Geological Survey on March 7, 1963, as a result of the completion

of a well on the leasehold. Decisions of August 6, 1974, and June 5, 1975, approved, respectively, assignments of shallow operating rights on portions of the leased land from Paul Moran to Twin Arrow, Inc., and from Shale Oil Co., to Peacock Oil Company, Inc. The decision below also, rescinded approval of the foregoing transfers of shallow operating rights.

Appellant, Peacock, while conceding that lease C-028499 was not renewed prior to the expiration of its 10-year term, maintains that the lease was held by production. Similarly, both appellants maintain that the provisions of 43 CFR 3107.8-2, prescribing the time for filing an application for a preference right renewal lease, are permissive and may be waived upon a showing that the failure to file an application was not unreasonable. Appellants further contend that they relied, and were entitled to rely upon the records of BLM, which, prior to the date of the decision appealed from, indicated that the lease had not terminated.

[1] With respect to the first argument, that a renewal lease may be held by production in the absence of a timely filed application for renewal, we need only point out that the 10-year renewal lease expired by its own terms on December 31, 1971, and appellant Peacock has cited no authority whatever in support of its contrary contention. The language of 30 U.S.C. § 188(b) relating to the cancellation of a valid lease where the lessee has breached the provisions thereof, has no application to a case such as this one where the lease, by its own terms, has expired. A renewal lease cannot be held by production, Melvin N. Armstrong, Montana Utilities Company, A-26474 (August 22, 1952), rev'd on other grounds, A-26474 (November 14, 1952).

While it is true, as appellants contend, that the Department of the Interior has repeatedly held that the provisions of 43 CFR 3107.8-2 (formerly 43 CFR 192.61(a)) are permissive and may be waived, there is also firm authority for the proposition that unexcused or excessively long periods of delay will bar an application for a preferential renewal. In Armstrong, 1/ supra, the Under Secretary held that:

1/ In Armstrong, upon reconsideration, A-26474 (Supp.) November 14, 1952, the delay in filing the renewal application was excused. The Department stated:

"Mr. Armstrong states in his petition, among other matters:

'That on July 4, 1949, Petitioner's wife had a stroke from which she never fully recovered as will more fully appear from the affidavit of the attending doctor (Dr. Edwin L. Rossman), which is attached hereto and made a part hereof by reference. That during

The fact that the time-limit provision contained in 43 CFR 192.61(a) can be waived does not mean that the Department will accept applications for renewal regardless of the tardiness with which they may be filed. * * *

fn.1 (continued)

the time Petitioner's wife was sick from July 4, 1949 until her death on April 11, 1951, he had to devote a great deal of his time to household duties, wait on his wife who was bedridden during her entire sickness and carry on his duties as Deputy Sheriff of Potter County, Texas. That in addition to the many duties Petitioner was endeavoring to perform which caused him great stress and mental strain, Petitioner had to put up with his wife's son about the house who would get drunk and ransack the house looking for valuable papers and articles to sell for the purpose of securing money with which to purchase more liquor which caused Petitioner to lose his papers and mail. That Petitioner has lost the oil and gas lease described above and was never advised of the date it would be necessary to make application for a renewal thereof until such time as he did make application - on or about April 30, 1951 - That Petitioner labored under such mental strain and stress during the period he should have made application for an extension that he himself eventually became sick and was hospitalized as will more fully appear from the attached affidavit of Dr. Edwin L. Rossman.'

Dr. Rossman's affidavit, which is referred to in the quoted excerpt, states that at the time when he saw Mrs. Armstrong on July 4, 1949, she had a cerebral hemorrhage and paralysis of the left side of her body; that she was in the hospital until August 21, 1949, with pneumonia complicating her condition; that from June 20 to July 5, 1950, she was hospitalized again; that during the time between her periods of hospitalization and until her death on April 11, 1951, she was constantly under his care; that during the prolonged illness of his wife, Mr. Armstrong was under a severe mental and nervous strain; that Mr. Armstrong was hospitalized for pneumonia on June 20, 1950; and that he (Dr. Rossman) was sure Mr. Armstrong had trouble properly taking care of his business during the entire time.

In view of this showing of the difficult personal situation in which Mr. Armstrong labored during a period of time beginning at least four months prior to the expiration date of his lease and ending in 1951, it is understandable that he overlooked the filing of his renewal application for the length of time that he did. In the special circumstances shown, the Department is disposed to waive the time requirement for the filing by Mr. Armstrong of his renewal application."

In view of the lack of any clear and persuasive showing to the contrary, it is concluded that there was an unreasonable delay in filing the application for renewal in this case, and that the Department would not be justified in waiving the provision in the pertinent regulation which states that such an application should be filed not less than 90 days prior to the expiration of the lease. A waiver in this case would be an undesirable precedent for encouraging dilatoriness on the part of lessees.

The length of the delay in Armstrong, supra, was a period of some 17 months after the expiration of the appellants' lease. The delay in the case before us now is a period of nearly 4-1/2 years. The delay in Armstrong, moreover, was partially explained by the fatal illness of Mr. Armstrong's wife while the delay in the instant case is accounted for only by the appellant's incorrect belief that the renewal lease was held by production. Cf. Phillips Petroleum Company, Cheyenne 028447a, GFS BLM 1957-35, approved by the Under Secretary, February 11, 1957, involving an excused ten month delay.

There are no circumstances in the case at bar which justify the delay involved or which compel a waiver of the renewal filing provision of 43 CFR 3107.8-2. Appellants, while stating generally that a "gross inequity" will result from their reliance on the records of the Colorado State Office, BLM, do not establish facts which would warrant acceptance of a renewal application, not yet filed, some 4-1/2 years after the lease expired.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman

Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

I agree that appellants have not yet made a sufficient showing to permit the lease term to be extended, but I would hold that upon such a showing the Department does have the authority and virtual obligation to waive the provisions of 43 CFR 3107.8-2 and extend the lease.

Both Peacock and Twin Arrow allege that they were not aware, until receipt of the May 24, 1976, State Office decision, that the lessee of record had not obtained renewal of the lease prior to January 1, 1972. Previously, on August 6, 1974, in the case of Twin Arrow and June 5, 1975, in the case of Peacock, the State Office had issued decisions approving the separate assignments of certain operating rights on the leasehold to appellants. Although the decision herein rescinded these earlier approvals, both appellants state that they relied upon the State Office approvals in purchasing the assignments of rights and in expending funds in conducting operations on the leasehold, which operations have resulted in producing wells. The appellants have also paid royalties to the United States on production which they have achieved on the leasehold. Peacock states that to "now deny the appellant the fruits of his labor would be a gross inequity, an inequity which the Secretary * * * has the authority to correct." Both appellants have been assigned record title, and have applied for departmental approval thereof so that applications may be made for extension of the lease.

It is beyond cavil that the Secretary has discretion to waive the provision requiring a lessee to apply for a renewal 90 days prior to the expiration of his lease, 43 CFR 3107.8-2. Julia Katherine Moore, Salt Lake 033190 (A), Gowers Federal Service (GFS) BLM 1964-64 (September 25, 1964; approved October 20, 1964); Paul Burton, Wyoming 042957, GFS BLM 1958-80 (April 15, 1958); Phillips Petroleum Company, Cheyenne 028447(a), GFS BLM 1957-35 (February 4, 1957, approved February 11, 1957). Assuming, therefore, that the regulation may be waived, the issue posed is whether it should be waived in these unusual circumstances. As determined in Burton, supra, the 90-day provision:

* * * is not mandatory and may be waived in an appropriate case, but that a waiver could not be granted in the absence of a clear and persuasive showing that the delay in filing the renewal application was not unreasonable. * * * Therefore, since there is a preference right to a renewal by the 20-year leaseholder, and since a tardy application for renewal may be granted upon a satisfactory showing, the 20-year lease is valid of record until a decision is rendered terminating that lease, and it serves to segregate the lands embraced therein from

further appropriations. It follows, that no decision having been rendered terminating that lease in whole or in part, the lease is valid of record and effectively serves to segregate the lands therein embraced from further appropriation. [Emphasis added.]

One reason for failure to renew, which has been held to be an acceptable excuse, is set forth in Phillips Petroleum, supra:

* * * It is explained that the present owner of the lease did not acquire title thereto until January 1, 1950, and because of an oversight based on a belief that the lease would not expire so long as oil or gas was produced in paying quantities, the application to renew the lease had not been filed before the expiration of the lease. The applicant acted promptly after learning that the regulations required renewal application with proper showing to be filed.

The oversight on the part of the lessee to file the renewal application due to the belief that the lease would not expire so long as oil or gas is produced in paying quantities is understandable. [1/] Wells are producing on the leasehold area, and commitments have been made to continue operations. Moreover, the lessee has acquired property rights of considerable value. Consequently this case is an appropriate one for waiver of the 90-day time limit within which an application for renewal of the lease, should be filed. [Emphasis added.]

As to the case on appeal, it has been alleged that production has continued since a time prior to expiration of the lease. The record is unclear as to why the holder of the lease at the time of the expiration, and subsequent thereto, did not apply for renewal. These matters should be clarified. Appellant Peacock, however, has specifically alleged an excuse similar to that in Phillips--that it was not aware the lease was of the type which required renewal.

1/ Within the industry, leases generally provide that the term is automatically extended by production.

The 1960 amendment of the leasing statute provides that leases issued pursuant thereto shall be extended by production or capability of production, 30 U.S.C. § 226(e) and (f) (1970). This amendment is in accordance with usual industry practice. In view of the equities herein, it would be appropriate to take into consideration this current Congressional policy. It will be noted that Melvin N. Armstrong, A-26474 (August 22, 1952), quoted supra, was vacated upon reconsideration, A-26474 (Supp.), November 14, 1952. The original decision, having been issued prior to the 1960 amendment, should be considered in the light of the Congressional policy subsequently embodied in the amendment.

Joseph W. Goss
Administrative Judge

